No. 4586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

12

OSCAR SPORGEON, *Plaintiff in Error,* vs. ANDREW F. MAHONY et al., *Defendants in Error.*	

Petition for Rehearing on Behalf of Defendants in Error.

FARNHAM P. GRIFFITHS,
HAROLD A. BLACK,
McCUTCHEN, OLNEY, MANNON & GREENE,
Balfour Building, San Francisco, California.
Attorneys for Defendants in Error.

FILED
FEB 16 1926
F. D. MONCKTON,
CLERK

Parker Printing Company, 523 Clay Street, San Francisco

No. 4586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OSCAR SPORGEON, *Plaintiff in Error,* vs. ANDREW F. MAHONY et al., *Defendants in Error.*	}

Petition for Rehearing on Behalf of Defendants in Error.

To the Honorable William B. Gilbert and Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

We are reluctant to file this petition. We do not like to question the soundness of a decision of this court. But we do quite sincerely believe there is error in this reversal. And, so believing, we think the court will not misapprehend our coming to it again to discharge the duty we feel we owe to our client of respectfully submitting what seems to us to be the error in the opinion.

This is a writ of error to review a judgment following a directed verdict for certain defendants in error in an action for personal injuries. We feel persuaded that had a verdict been given by the jury in favor of the plaintiff below, it would have been the duty of the trial court to have set it aside; and if this be the case, under the well-settled rules of the federal courts, the directed verdict was proper.

The complaint in this action, it will be remembered, proceeds on the theory that defendants failed to exercise reasonable care that a certain ring-bolt was "so fastened that the same would resist an ordinary pull *for which said bolt was intended*".

It is conceded, however, that the ring-bolt was put into the ship for an entirely different purpose from that for which it was used by plaintiff when he received his injuries. It is not disputed that the ring-bolt was of proper and customary construction for its intended use, namely, lashing the booms to the deck or for "stopping" lines, *but was not intended* as a base through which to reeve ropes in hauling cargo about the deck. It was neither alleged in the pleadings nor contended upon the trial that anyone directed plaintiff to use the bolt in the manner in which he did, plaintiff admitting that he was in charge of the work on the after deck and had the power and authority to select his own method of performing the task he had to do. It affirmatively appears, moreover, that defendants had provided properly constructed substantial bitts and a heavy rolling chock for the very purpose of doing the work to per-

form which plaintiff employed the ring-bolt.

As a matter of law, it is not suggested, nor could it be that a master owes any general duty to make an appliance safe for any purpose other than that for which it is intended; nor is it disputed as a legal proposition that the mere fact that the appliance happens to be placed where it can be misused by a servant does not warrant the inference that the master is at fault in not knowing that he is likely to do so.

The basis for the doctrine that the master is not liable when appliances are diverted to purposes other than those for which they were intended is that a situation supervenes which the master cannot be held to have anticipated. He is therefore not bound to provide against the dangers created by it. It follows that the fundamental and primary question to be decided in this case is whether this record shows any evidence of negligence on the part of these defendant shipowners. If it does not, then the issues of assumption of risk and contributory negligence, of course, need not be considered. If it does not, then whether plaintiff's act was or was not positively negligent is immaterial, as his act was one which defendants could not reasonably have expected him to commit.

In a case of this kind where an appliance is used improperly, resulting in injury to the person who misused it, the only condition upon which a defendant master can be liable is when he is charged with knowledge that the appliance is being wrongfully used, and acquiesces in such improper use.

May we not fairly say that this is the basis of the decision, which we are respectfully asking to have reconsidered, as appears from the concluding sentence of the opinion:

> "There appeared enough to call for submission of the testimony as related to the doctrine that acquiescence of a master in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose."
>
> *Labatt, Master and Servant,* Sec. 923.

But, with all deference we submit that this record could not support a verdict for plaintiff on this theory.

In order to make the master liable for an injury resulting from a servant's improper use of an appliance, it is necessary for the servant to prove, either:

(1) that the misuse is done by the master's express order or by his consent; or

(2) that it is done in pursuance of a custom which has become general enough so that the master's acquiescence can be presumed.

The mere fact that the appliance may have been misused occasionally prior to the accident will not justify the inference that the master acquiesced in such misuse. There must be an affirmative showing to that effect or a general custom or practice must be proved.

The rule, it seems to us, is quite clearly stated in the very work cited by this Court, *(Labatt on Master and Servant).* This author reviewing the rule with refer-

ence to a master's acquiescence in the improper use of an appliance, says (Vol. 3, p. 2465):

> "The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose. Accordingly, a qualification of this rule, that a servant cannot recover in the absence of evidence showing that the appliance in question was constructed with reference to the use to which it was being put when the accident occurred, is admitted in cases where it appears that it was customary for employees to put it to that use, and that the master knew of this custom. *But the mere fact that an appliance had been diverted to new uses before the accident in suit will not render the master liable, if that diversion occurred without his knowledge or consent. Nor is an occasional improper use of an appliance, not in pursuance of a recognized custom, sufficient to render the master liable on the ground of acquiescence."* (Italics ours.)

The cases supporting this doctrine are quite numerous, and only a few of them need be noted here.

In

Teetsel v. Simmons, et al., 34 N. Y. Sup. 972,

plaintiff sought to recover for personal injuries caused by the breaking of a platform or switchboard on which plaintiff stood while working a switch. The evidence showed that this switchboard was not intended to be a passageway from one part of the building to another, but was to be used as a switchboard only. It was shown that it was occasionally used by some of the workmen as a passageway. There being no showing,

however, of any custom or any affirmative proof of authority given by the defendants so to use it, it was held that plaintiff was not entitled to recover. The syllabus reviewing the case reads as follows:

> "Where an appliance which is sufficient for the purpose for which it was intended is occasionally used by the workmen for another purpose, for which it is not sufficient, but such use is not in pursuance of any custom or by any authority of the master, a workman injured by such improper use cannot recover against the master."

So in

> *Sievers v. Peters Box & Lbr. Co.,* 151 Ind. 642, 50 N. E. 877,

plaintiff was injured by reason of the falling of an elevator in defendant's factory. It was shown that the elevator was designed for the carriage of freight only. It was complained that the elevator was defective as it did not have safety appliances thereon. It was further shown that the accident occurred on the first day of the operation of the elevator, and that on that day a good many other employees had ridden up and down upon it. It was held that there was no duty on the part of defendant to put safety appliances on a freight elevator, and that the mere fact that a number of other employees had ridden upon it could not alter the situation in the absence of proof of knowledge and acquiescence of the defendant, and that no custom or practice for the improper use of the elevator was established by such testimony.

The same principle is applied in

Burns v. Old Sterling Iron & Milling Co., 188 N. Y. 175; 80 N. E. 927,

the syllabus in which case reads as follows:

> "Where a mine was equipped with a system of ladders, well lighted, kept in good order, and commonly used by the mine employees in going to and from the mine, though the master mechanic, the mine boss, the blacksmith, and two miners occasionally rode in a car used for hoisting ore, one of the miners testifying that the mine boss told him not to use the car, the court should have decided as a matter of law against plaintiff's contention that the car was an appliance furnished by the master to be used as a passenger elevator."

So also in

Staley v. Wehmeier, 187 Ky. 445, 219 S. W. 408.

Plaintiff was injured by attempting to use a coal chute door as a passageway. The evidence showed that the door had been used occasionally by employees for convenience as a means of egress and ingress. It was held that this would not make the master liable for the misuse of this door, as he had provided other safe ways of entering and leaving the plant. There was held accordingly to be no evidence whatever of negligence, and a directed verdict for defendant by the court below was affirmed by the appellate court.

See also

Hahn v. Chicago M. & St. P. Ry. Co., 196 N. W. (Minn.) 257,

(Plaintiff injured by using a housing box as a plat-

form cannot recover damages, notwithstanding the testimony that other employees had at times used the housing in a similar fashion.)

Dawson v. King, 222 S. W. (Tex.) 164.

(Employer owed no duty to make a door safe as a means of ascent to upper floor unless he knew or should have known that employee was so using it.)

A careful search of the authorities has revealed no case where a defendant was held liable for a servant's misuse of an appliance except on one of the following three grounds:

(1) the servant was ordered to use the appliance as he did;

(2) the master had actual knowledge of the misuse and acquiesced in it;

(3) the misuse was in pursuance of a custom or practice of which the master had actual or constructive notice.

We believe there is no evidence in the record of this case which will support any of these three propositions. There is not the slightest claim of any showing of actual knowledge of the misuse of this ring-bolt on the part of any of the defendant shipowners, either on the occasion of this accident or at any time prior thereto.

Nor is there any showing of a general custom or practice obtaining for the use of this bolt for the purpose of moving cargo about the deck. It is true that the plaintiff testified that the ring-bolts were being used

by the chief officer and the third officer in loading the vessel (Tr. p. 28). This is the only instance disclosed by the record of any prior use of these bolts for any purpose other than that for which they were intended to be employed. It is conceded that for the purpose of determining the correctness of the ruling of the court directing a verdict, the plaintiff must have the benefit of any evidence which is conflicting, but it also must be admitted that uncontradicted evidence offered by defendants must likewise be received and considered. On this issue, therefore, as to whether there was any custom or practice of using these ring-bolts as plaintiff used them on this occasion, we have plaintiff's statement that they were used on one occasion during the loading. On the other hand, there is the testimony of the winchdriver Lauritzen that he had never before seen an eye-bolt used like this one was used (Tr. p. 21); the witness Cleaver, for two years second mate and chief officer on the vessel, who testified that never during that period were the ring-bolts used for any other purpose than that for which they were put into the vessel (Tr. p. 53); and also Captain Halvorsen, master of the ship for a little over a year, who stated that he had never seen the ring-bolt used in connection with handling lines prior to the occasion involved in the present case. This then is the state of the record on the question of any custom or practice with reference to the improper use of this equipment.

Nor can it be said that the chief officer stood in the shoes of the defendants so that his alleged acquiescence

in the use of these ring-bolts for handling cargo was that of the shipowners. The captain of the ship, it is true, might be held to be the representative of the shipowners as to the condition of the deck department (Mahony, Tr. p. 77). Had there been any showing that the captain authorized these ring-bolts to be used as plaintiff used them, it might be arguable that this would be evidence of acquiescence on the part of the master in a servant's misuse of appliances; but so far as concerns the after end of the ship where these bolts were located, the evidence shows without conflict that plaintiff, himself, the second mate, was in complete charge. This appears from plaintiff's own testimony.

Sporgeon (Tr. p. 26):

> "On this particular day we were busy discharging lumber, and about eleven o'clock in the morning *on my end of the ship,* the chief officer, Ole Grande, came to me and said, 'Well, this afternoon, Mr. Sporgeon, you will have the longshoremen remove the laths from the hatch aft and amidships'."

And again on page 37 of the transcript:

> "I was in charge of the operations."

Other witnesses, both for plaintiff and defendants testified to the same effect:

Mahony (Tr. p. 71):

> "If anything was wrong on that deck, the after end, that would be under the second mate."

Lauritzen (Tr. p. 21):

> "The second mate had charge of the work on the after deck; I do not know where the first mate

was, the first mate was looking after both ends; he had charge of the whole thing, and the second mate had charge of this particular operation."

McFadden (Tr. pp. 44, 46):

"The second mate superintended the job. * * * Two sailors were in charge and they were taking orders from the second mate."

Grande (Tr. p. 64):

"Sporgeon had charge of the after end of the ship at that time. I gave him orders to see that different orders came aft. There was a load to be hauled aft and away from some other lumber that had to come out first. I gave him instructions to move it aft, but not how it should be done. I did not direct him how to put up the lines, he knows that much himself. That was left entirely to him. I did not give him (any) instructions as to the use of an eye-bolt. I did not see any of the operation of moving this lumber aft. I was in the other end of the ship then. I first heard of the accident an hour afterwards, when the winch driver told me about it."

It thus affirmatively appears that plaintiff himself was in full charge of the operation, and that the method of doing this work was entirely upon his own volition.

Had no other means of performing this task been provided, defendant might be held to have acquiesced in the manner in which plaintiff did it, but there is no showing of that whatever. The testimony shows conclusively that it was not necessary to use this ring-bolt at all to accomplish the work that plaintiff had to do. It is admitted by plaintiff himself that the rolling chock was properly constructed and was in good work-

ing order (Tr. p. 39). Captain Halvorsen (Tr. p. 51), Mr. Becker (Tr. p. 59), Mr. Cleaver (Tr. p. 53) and Captain Lancaster (Tr. p. 55) all agree that it would be easy and simple to do the particular job which plaintiff had to perform with the equipment provided on the vessel for that purpose. It is therefore apparent, and we submit uncontradicted, that defendants had provided adequate facilities to do this work which did not require the use of this ring-bolt. With this array of testimony to meet, it is evident that plaintiff could not possibly recover without justifying in some way his deliberate failure to use the safe method of doing the work provided for him in favor of the unsafe method he chose, with its probable, we may well say inevitable, consequence of injury to someone in so doing. His testimony falls far short of meeting it. After plainly testifying upon his case in chief that he proceeded immediately to use the ring-bolt at the very inception of the work, plaintiff asserted in rebuttal that when he started to heave the load aft, the line "jumped off that particular spool in the corner", and that he put it through the ring-bolt to hold it down. If this testimony means the plaintiff attempted first to use the chock provided on the ship, before he tried to use the ring-bolt, it does not mean, we respectfully submit, that the chock was "impracticable or dangerous" as the opinion of this court suggests. With every expert agreeing that the only proper method of accomplishing the work was to use the chocks provided for the purpose, with the master of the ship and the former

mate testifying without contradiction that for at least three years the chocks had been continually and solely used for this work, the only possible inference to be drawn from plaintiff's recital, assuming that his ambiguous testimony means that the chock was used at all, is not that it was impracticable, but that plaintiff was not handling it in proper fashion. If, indeed, the rope jumped off because the load was two feet above the level of the poop deck when suspended by the falls, why plaintiff could not have directed the winchdriver to have slackened the falls and dropped the load a foot or two, is not apparent.

As a matter of fact, however, plaintiff made no contention that it was necessary to use this ring-bolt in heaving the load aft. Plaintiff admits that there was another way of doing this work, but attempts to take refuge in the assertion that the mate did not give him time to rig up the gears. Although not discussed by this court in the opinion, we believe there is merit in the contention urged in our brief that this claim, that the mate unduly hurried the plaintiff in his work, could not be used to support a verdict, as no contention of the sort was pleaded. If the rule of variance means anything, it seems to us it should not allow a plaintiff to file a complaint charging *defective appliances*, permit the deposition of a witness to be taken on that issue without suggesting anything else, and then urge for the first time at the trial when that witness is no longer available, that the witness was at fault in hurrying plaintiff so that he was obliged to misuse the ship's equip-

ment. Be that as it may, however, we still insist, that even considering this evidence and giving it its full effect cannot change the result. Plaintiff was not a mere seaman, he was a licensed officer and in charge of the operation. It is nowhere suggested that anyone ordered him to use the appliance as he did. In any event, we think that the proof in this connection is not evidence of negligence on the part of the chief officer. In substance, all the testimony amounts to is that the mate was anxious to complete the job as speedily as possible, but there is no showing that he forced plaintiff to do the work in the manner in which plaintiff ordered it done. We do not understand on what theory it could be successfully contended that the desire on the part of the mate to have this work accomplished quickly could possibly excuse the man in full charge of the after end of the vessel from taking reasonable precautions not only for his own safety but for the safety of the men under his direction. Furthermore, as has been pointed out in the brief, it affirmatively appears from plaintiff's own testimony that two hours elapsed from the time he first received instructions to remove the laths until he actually commenced the work; this in the face of his statement on cross-examination that it would have taken but fifteen minutes to a half hour to have done the work in a proper manner. We think it clearly appears from the whole record that this claim of plaintiff that he was crowded for time falls far short of creating liability against defendant shipowners for this accident.

The following three propositions fairly appear in this case, and unless we are overlooking something,

are conclusive against plaintiff's right to recover:

(1) the appliance alleged to be defective was entirely proper and suitable for the purpose for which it was intended;

(2) the appliance was devoted to a wrongful purpose by plaintiff himself without orders from anyone;

(3) there is no evidence of acquiescence on the part of the master in the improper use or of any custom or practice of such misuse, of which the master had actual or constructive knowledge.

We respectfully urge that this court reconsider its former opinion and enter a decision affirming the judgment of the district court.

Respectfully submitted,

FARNHAM P. GRIFFITHS,
HAROLD A. BLACK,
McCUTCHEN, OLNEY, MANNON & GREENE,
Attorneys for Defendants in Error.

Dated San Francisco,
February 15, 1926

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the attorneys for Defendants in Error herein; that the foregoing petition for rehearing is, in my judgment, well founded, and that it is not interposed for delay.

FARNHAM P. GRIFFITHS.